Supreme Court, U.S.
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No. 03-18

IN THE

Supreme Court of the United States

ADRIAN D. HORIEN,

Petitioner,

v.

CITY OF ROCKFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This case does not meet the standard stated in Supreme Court Rule 10 for granting a petition for writ of certiorari only for compelling reasons.

This court has upheld a similar ordinance regarding noise as not void for vagueness. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

The state trial court and appellate court in this case decided this case consistently with the decisions of this court. The appellate court analyzed the city's nuisance noise ordinance under the standards set forth by this court, and determined that the ordinance is content neutral and is a reasonable restriction on the time, place and manner of constitutionally protected speech. The appellate court correctly held that when reviewing the ordinance from an intermediate level of scrutiny, it was narrowly tailored to serve a significant governmental interest and left open ample alternative channels for communication of the information.

Petitioner has completely ignored the holdings of this Court recognizing that a person's free speech rights do not include the right to be "so intrusive that the unwilling audience cannot avoid it" *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

This Court has held that the government has a substantial interest in protecting its citizens from unwelcome noise. This Court has upheld noise and other restrictions affecting protected speech at abortion clinics. This Court has also upheld people's right to be free from unwelcome speech in the privacy of their homes and at their places of business.

The doctrine of overbreadth is an exception to the normal rule regarding standards for facial challenges. The Rockford ordinance is not subject to the overbreadth doctrine because it does not punish a substantial amount of protected free speech.

I. The Lower Court's Ruling That The Rockford Ordinance Is Not Unconstitutionally Vague Is Consistent With Decisions Of This Court

Petitioner incorrectly asserts that the decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) holding a Cincinnati ordinance unconstitutionally vague is binding on this case. The ordinance in *Coates* was a disorderly conduct case prohibiting assembly and conduct in a manner annoying to persons passing by. 402 U.S. at 611.

The Rockford "nuisance noise" ordinance specifies that the prohibited conduct is causing or creating any unnecessary or usual noise, and that the noise annoys, injures, or endangers the comfort, repose, health or safety of others. The ordinance permits noise that is necessary for the protection or preservation of property or of the health, safety or life or some person. Sec. 17-10, City of Rockford Code of Ordinances. Pet., App. C at 14a.

The case that is more comparable to the Rockford ordinance is *Kovacs v. Cooper*, 336 U.S. 77 (1949). In *Kovacs* this Court held that the city of Trenton's ordinance prohibiting the use of sound trucks on city streets and prohibiting the use of any instrument attached to and upon a vehicle which emits loud and raucous noises complied with First Amendment requirements of definiteness and clarity. 336 U.S. at 80. This Court in *Kovacs* held that while the

words "loud and raucous" in the ordinance are abstract words, through daily use they acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden. 336 U.S. at 79.

The Rockford ordinance is more specific than the Trenton ordinance because in addition to addressing the volume of the noise, it also requires that the noise annoys, injures, or endangers the comfort, repose, health or safety of others. The appellate court in this case correctly held that the word 'annoying' had a well-established meaning in the context of common-law nuisance, and that the Rockford ordinance likewise generally prohibited sounds that constituted a nuisance and was therefore not unconstitutionally vague. Pet., App. A at 5a.

II. The Lower Court's Ruling That The Rockford Ordinance Is A Valid Time, Place And Manner Restriction On Free Speech Is Consistent With Decisions Of This Court

A. The Rockford Ordinance Is Content Neutral

As the facts of this case show[1], the "nuisance noise" ordinance of the city is designed to ensure that its citizens are not disturbed in their homes and places of business. This Court has recognized governmental authority to make such regulations.

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1. The complainant in this nuisance noise ordinance violation was a resident who lived at the opposite end of the block from the Respondent's location at the Northern Illinois Women's Center. 12/12/01 Tr. 18. The building owner of the Center also testified concerning the nuisance noise created by the Respondent. 12/12/01 Tr. 24-29. The building owner lives there. 12/12/01 Tr. 31.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court upheld the New York City's guidelines for use of a public bandshell, including a requirement that performers use sound amplification equipment and a sound technician supplied by the city. *Ward* found the New York regulation to be a content neutral regulation that served purposes unrelated to the content of the expression, even though it had an incidental effect on some speakers or messages but not others. 491 U.S. at 791-792.

The Rockford ordinance is clearly a content neutral time, place and manner regulation under the standard of review discussed in *Hill v. Colorado*, 530 U.S. 703 at 719-720 (2000). The ordinance was not adopted because of a disagreement with the message conveyed. The ordinance applies to all nuisance noise, regardless of whether it is even speech or other types of noise, much less the content of the speech. The city's interest in protecting the privacy of unwilling listeners and allowing people the quiet enjoyment of their homes and businesses is not related to the content of the speech. The Rockford ordinance refers to noise, not speech.

B. The Rockford Ordinance Is Narrowly Tailored To Serve A Significant Government Interest

This Court has also held that municipalities are entitled to use their police powers to regulate noise. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protects the well-being and tranquility of a community. [FN4] A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs*, 336 U.S. at 83. In upholding the Trenton sound truck ordinance

in *Kovacs*, this Court stated "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. [FN12] In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." 336 U.S. at 86, 87. In this case there were unwilling listeners both at the abortion clinic and at home. 12/12/01 Tr. 7-8, 11, 24-26. The city is clearly entitled to protect these citizens from noise that interferes with their right to be let alone.

This "right to be let alone" was acknowledged by this Court in *Hill v. Colorado*, 530 U.S. 703 (2000) as an interest to be balanced against free speech rights in situations involving unwilling listeners. *Hill* upheld a Colorado criminal statute prohibiting any person from knowingly approaching within eight feet of another person near a health care facility for the purposes of displaying signs, engaging in oral protest, education, counseling or passing leaflets or handbills without that person's consent against vagueness, overbreadth and prior restraint complaints.

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' the one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

Hill, 530 U.S. at 716, 717. *Hill* held that the restrictions imposed by the Colorado statute were legitimate protection of the right 'to be let alone' by unwilling listeners. 530 U.S. at 718.

The appellate court's holding in this case that the Rockford ordinance was narrowly tailored to serve the significant government interest of regulating noise because the ordinance prohibits only sounds creating a nuisance is consistent with this Court's holding in *Hill*.

C. The Rockford Ordinance Leaves Open Ample Channels For Communication Of Protected Speech

This Court in *Hill* held that the Colorado statute was narrowly tailored to serve the state's significant and legitimate interest in protecting unwilling listeners and that it left open ample alternative channels for communication. 530 U.S. at 725, 726. This statute restricted display of signs, leafleting and oral speech. In contrast, the Rockford ordinance incidentally affects only oral speech. Display of signs and leafleting, alternate avenues of communication, are not regulated by the Rockford ordinance. Speech that does not rise to the volume level of nuisance noise is not regulated by this ordinance.[2]

III. The Lower Court's Ruling That The Rockford Ordinance Is Not Overbroad Is Consistent With Decisions Of This Court

Overbreadth has been characterized by this Court as "strong medicine", and "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech . . ." *Virginia v. Hicks*, __ U.S. __, 123 S. Ct. 2191 at 2199, 71 USLW 4441 (2003).

2. The Respondent was part of a group of protestors at the clinic. 12/12/01 Tr. 10, 35. The Respondent was the only protestor who received a noise violation complaint. 12/12/01 Tr. 17-18.

This Court has held that " 'particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Hill*, 530 U.S. at 732 [citing *Broadrick v. Oklahoma*, 413 U.S. 601 at 615 (1973)]. As in *Hill*, because any person creating nuisance noise is encompassed within the Rockford ordinance's 'legitimate sweep', the Rockford ordinance is not overly broad.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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